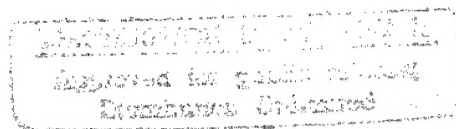


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Foreign Ownership Restrictions in
Communications
and
“Cultural” Trade:
National Security Implications

Donna M. DiPaolo
*U.S. Department of State
Civilian*

Faculty Research Advisor
Dr. Kenneth B. Moss



The Industrial College of the Armed Forces
National Defense University
Fort McNair, Washington, D.C. 20319-5062

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ABSTRACT

The controversy surrounding massive legislative opening and reform of the domestic U.S. telecommunications market in 1996 all but obscured a subsidiary -- and uncompleted -- debate over whether also to remove the last remaining international barriers, that is, foreign ownership restrictions in communications. Even if Congress had acted on foreign ownership restrictions, any relaxation would likely have been strictly limited because of traditional political concerns about foreign influence in the American broadcast industry. Nonetheless, a reexamination of foreign ownership restrictions is both important and timely. As we enter the "information age", we need not merely to review whether these restrictions are anachronisms with respect to protecting our national security, but to ask whether their continued existence is harmful to broader American interests. Do they affect the ability of U.S. firms to compete globally and of U.S. consumers to receive a complete and truly competitive range of services? Many analysts would say yes. In a world where global alliances are increasing and trade disputes are more and more likely to revolve around governmental notions of protecting "cultural identity", keeping the U.S. communications market closed to foreigners may harm rather than help U.S. efforts to open foreign markets to our own exports and business interests.

This paper looks at the original national security concerns giving rise to foreign ownership restrictions, and presents the case that information technologies have long since outstripped any effectiveness section 310 -- a licensing tool -- may have had in preventing foreign agents from transmitting radio messages (whether espionage or propaganda) during wartime. It reviews the changing definition of national security, and rejects the

notion that current national security concerns -- even if the definition is extended to "economic security" -- are addressed by such restrictions. The paper also notes that the Federal Communications Commission (FCC) adopted new enforcement standards in November 1995 which permit the relaxation or removal of foreign ownership restrictions on radio common carrier licensees on the basis of reciprocity, but asks whether this movement is sufficient in light of the prospective convergence of information technologies -- telecommunications, broadcast, satellite, and computer. Finally, the paper outlines the impact of these new technologies, and offers a scenario in which citizens of the world exchange information and ideas freely, unfettered by sovereign governments. In conclusion, the paper suggests that section 310 has outlived its original purpose, and that a policy dialogue is needed on dropping broadcast as well as common carrier restrictions to help the U.S. respond more effectively to future economic and "cultural" challenges.

I. INTRODUCTION

With passage of the Telecommunications Act of 1996, Congress has gone a long way toward a much-needed opening and reform of the domestic telecommunications market. Among other historic actions, the new law removed regulatory barriers between provision of local and long distance telephone service, and between cable television and telephone service. However, one area considered for action but ultimately left intact -- foreign ownership restrictions in communications -- may be worthy of another look.

The rapid pace and seemingly endless scope of technological change in communications/information delivery, is, of course, a worldwide phenomenon. Reforms of the domestic market, while essential, may not be sufficient to ensure the ability of U.S. firms to compete globally and of U.S. consumers to receive a complete and truly competitive range of services. With such trends as development of direct broadcast satellite delivery systems, world-wide computer links and convergence of communications and broadcast technologies, we need to ask whether legislative and regulatory constraints on foreign ownership of common carrier and broadcast licensees have become anachronisms with respect to their original policy goals. More importantly, we need to ask whether existing restrictions on foreign ownership are actually hindering other important policy goals. For example, foreign ownership restrictions may be impeding us from dealing effectively with the growing bilateral and multilateral agenda of "cultural trade" disputes in which some of our largest and most important trading partners try to control communications content beamed across their borders. Possible protectionist

motivations notwithstanding, their expressed concern is whether "globalization" of information will in reality mean "Americanization" of their societies and cultures.

In November 1995, after a review of some of these questions, the Federal Communications Commission (FCC) adopted new enforcement standards which permit the relaxation or removal of foreign ownership restrictions on radio common carrier licensees on the basis of reciprocity. Like the abortive Congressional debate, FCC action stopped short of reaching broadcast licensees because of traditional political concerns about foreign influence in the American broadcast industry. Was the FCC movement sufficient? While this paper cannot explore all facets of the issue, it will examine whether the original legislative intent -- protection of national security -- of foreign ownership restrictions in communications is still relevant and, if so, whether existing restrictions provide the desired protection, or are even practical given the rapid advance of technology. Finally, the paper will discuss the possible benefits of modifying or eliminating these regulatory hurdles to help U.S. firms meet new technological and global competitive challenges.

II. FOREIGN OWNERSHIP RESTRICTIONS IN COMMUNICATIONS -- AN OVERVIEW

With the passage of the 1996 umbrella legislation, the U.S. has opened its telecommunications market to all comers, both domestic and foreign. As Robert Mayer, senior manager of Deloitte Touche, was quoted as saying, "It's the industry equivalent of the Berlin Wall being broken down".¹ Among the last remaining restrictions are those embodied in section 310 of the 1934 Communications Act, as amended, which restricts the holding of radio station licenses by aliens (including corporations) and foreign governments.

What Are They?

Section 310 (47 U.S.C.), in relevant part, provides that:

- (a) The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.
- (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--
 - (1) any alien or the representative of any alien;
 - (2) any corporation organized under the laws of any foreign government;
 - (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
 - (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative

¹ The Washington Post, February 2, 1996, p. A15.

thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

In plain language, 310 (a) bars foreign governments and their representatives from holding radio licenses in their own right. Section 310 (b) applies to common carrier radio, broadcast radio and aeronautical service licenses.² It bars private foreign investors and foreign corporations from holding such licenses, and prohibits aliens from sitting on the board or becoming an officer of a licensee. To guard further against foreign control of licensees, the law imposes a foreign ownership limit of 20 percent of the shares of a company holding such a license. That limit is fixed; the FCC has no discretion in its application. However, the statute permits a greater measure of foreign participation, as opposed to control, via parent or holding companies.

While the applicability of the statute's direct control tests are fairly clear, the interpretation of section 310 (b) (4)'s public interest test is less straightforward. On its face, it would appear that greater than 25 percent indirect foreign control or ownership would be permitted unless the Commission finds the public interest would be harmed. However, in enforcing this provision, the FCC has interpreted the provision as a bar to investment, presuming that the 25 percent holding company limit should not be waived unless the potential investor can demonstrate no harm.³ In the Commission's own words, section 310 (b) (4) "gives the Commission discretion to allow higher levels of foreign

² The wording of the statute implies that non-radio common carriers are subject to these limitations, but FCC case law has limited the provision's applicability to radio licensees. See., e.g., Foreign Ownership of CATV Systems, 77 F.C.C. 2d 73 (1980), in which the FCC declined to apply section 310 (b) restrictions to cable television.

³ See, e.g., "A Policy Maker's Guide to Deregulating Telecommunications, Part 4: Why Telecommunications Protectionism Should Be Ended," Adam D. Thierer, The Heritage Foundation, March 2, 1995.

ownership as long as the Commission determines that such ownership would not be inconsistent with the public interest.”⁴ The FCC has exercised this discretion on several occasions, albeit “usually...where the alien...influence will be nonexistent or minimal” and the aliens involved are “citizens of close allies” or “even former United States citizens.”⁵

Why Are They There?

No matter how they have been interpreted over the years, section 310 restrictions seem to have been clearly grounded in national security concerns. According to an exhaustive legislative history compiled by analyst J. Gregory Sidak, the origins of these concerns date back to the use of wireless communications by the Japanese Navy in the 1904 Russo-Japanese War.⁶ Examining the lessons from this war, the Interdepartmental Board of Wireless Telegraphy appointed by President Theodore Roosevelt recommended that the nascent wireless communication industry be brought under governmental control. The Navy was given responsibility for carrying out the recommendation, but was unable to gain popular and Congressional support for government monopoly of this fast-growing, exciting industry. However, the Navy successfully persuaded Congress of the potential military importance of radio, and foreign ownership restrictions were written into the Radio Act of 1912 to prevent foreign agents from transmitting radio messages, especially during wartime.

⁴ FCC Report and Order in the Matter of Market Entry and Regulation of Foreign-Affiliated Entities. FCC 95-475, IB Docket No. 95-22, November 28, 1995, pp. 69-70.

⁵ James G. Ennis and David N. Roberts, “Foreign Ownership in US Communications Industry: The Impact of Section 310”, 19 International Business Lawyer, May 1991, p. 245.

⁶ J. Gregory Sidak, Foreign Investment in Telecommunications. Working Paper Prepared for the American Enterprise Institute for Public Policy Research, presented November 1995.

Congressional debate prior to passage of the Radio Act of 1927 highlighted opposing points of view on foreign ownership restrictions. While proponents of eliminating loopholes in the earlier legislation viewed the restrictions as necessary to prevent alien activities against the United States in time of war, opponents pointed out that the country already had even greater power -- to seize radio stations -- "in time of war or peril."⁷ Gregory Sidak concludes that the final act indicated that Congress "believed the national security interests involved to be sufficient to require heightened safeguards to protect the airwaves from foreign influence"⁸

The Communications Act of 1934 tightened foreign ownership restrictions by extending their application to holding companies. In making this and other changes, the Act put an end to discussion of outright government ownership of radio and attempted to deal with the now heavy competition for radio spectrum use. Continuing to assert national security concerns in the strengthened foreign ownership limits, Congress drew on "lessons that the United States had learned from the foreign dominance of the cables and the dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during (World War I)".⁹

What's Their Impact?

On their face, section 310 (b) restrictions appear to have quite narrow application. Cable television, direct broadcast satellite, subscription television, and subscription video

⁷ 37 Stat. 302, section 2 (1912).

⁸ Sidak, *op.cit.*, p. 75.

⁹ Hearings on H.R. 8301 before the House Committee on Interstate Commerce, 73d Congress, 2d Session 26 (1934).

program services are not considered either broadcast or common carrier systems, and thus foreign ownership is not restricted.¹⁰ Nor are foreigners restricted from investing in U.S. firms which provide private radio-based services (which may compete with cellular service providers), or in equipment or telecommunications service providers which do not use the radio spectrum.¹¹ The section does not block foreign telecommunications firms from operating or constructing fiber optic facilities, or from resale activity.¹² Moreover, it is even possible for foreign carriers to enter the U.S. market through lease and operation of the very broadcast and radio licenses which are controlled by the provision.¹³ As recently as last year, Senator Robert Byrd noted that section 310 "...has not been very effective and has not prevented foreign carriers from entering the U.S. market."¹⁴

However, the practical effect of section 310 restrictions is much broader than might be thought given their limited scope, primarily because of two factors -- the increasingly integrated and international nature of communications firms, and the law's policy impact vis-a-vis other countries. In 1986, section 310 (b) was cited as the rationale for refusing license renewal to 13 television stations which were partially owned by a Mexican media firm.¹⁵ More recently, BT's interest in a 20-percent acquisition of MCI, and similar interest by Deutsche Telekom and France Telecom in Sprint, generated comments to the effect that the proposed investment levels might have been greater "but

¹⁰ Ennis, op. cit., p. 246.

¹¹ Sorin A. Bodea, "The Impact of Section 310 of the Communications Act of 1934: Economic and National Security Issues," An incidental paper of the Program on Information Resources Policy, Harvard University Center for Information Policy Research, August 1992, p. 5.

¹² Statement by Senator Robert C. Byrd, Congressional Record, May 25, 1995, S7493.

¹³ Comments of AT&T before the FCC, Docket No. 95-22, (undated), p. 39.

¹⁴ Sen. Byrd, op. cit.

¹⁵ Thierer, op. cit., p. 4.

for" section 310 (b) restrictions.¹⁶ A long-standing complaint by foreign governments is expressed well by the European Commission (EC) in a 1992 statement that U.S. restrictions on foreign ownership of common carriers "virtually preclude (foreign companies) from offering common carrier services in the U.S. using radio communications...because most common carriers need to integrate radio transmission stations and satellite earth stations into their networks."¹⁷ Though brief, these examples indicate clearly that the twin new waves of technological convergence and globalization of service providers were not envisioned in 1934, or even in the not-so-long-ago world of AT&T dominance. In today's market, firms are engaged in a feeding frenzy of strategic alliances and acquisitions in all possible delivery modes, trying to hedging their bets against tomorrow's developments.

The other factor making section 310 (b) restrictions perhaps more important than their limited scope might suggest is related to international telecommunications policy and multilateral politics. In its quest for greater multilateral liberalization in trade generally, and in telecommunications services in particular, the United States has repeatedly encountered resistance from other countries, even close trading partners, on the grounds that because of section 310 the U.S. does not come to the table with "clean hands." Such resistance is essentially protectionist in nature, based on other countries' concerns about the size and competitive strength of the U.S. industry. Nonetheless, section 310 does

¹⁶ Thierer, *op. cit.*, p. 4, and J. Gregory Sidak, "Why Limit Foreign Investment in Telecommunications?", *On the Issues* series, American Enterprise Institute for Public Policy Research, (undated). The same analysts also suggest that the protectionist effect of section 310 (b) is quite significant, both in terms of making American firms less competitive, and in restricting the ability of foreign firms to offer capital and expertise to American firms and greater choice to American consumers.

¹⁷ Quote contained in Bodea, *op. cit.*, p.7.

impede these negotiations. As Senator Byrd noted, "Even though Section 310 has not prevented access into our market, the existence of the section has been used by foreign countries as an excuse to deny U.S. companies access to their markets."¹⁸ The search for a way around this policy obstacle, in fact, was at the core of the reciprocity proposals explored recently both by Congress and the FCC, under which the U.S. would use waivers of section 310 (b) (4) restrictions as leverage to pry open foreign markets.

However, another policy obstacle is even less easily amenable to solution. The advance of new communications technologies has added different twists and renewed intensity to what have been traditionally referred to as audio-visual policy disputes, *e.g.*, French and U.K. foreign content quotas for television programming.¹⁹ In the last few years, proponents have promoted the term "cultural" policies, based on the rationale that protectionist regulation is needed to preserve national "cultural" identity against the onslaught of international (*i.e.*, American) programming and other information flows (such as magazines). For example, several such disputes have arisen since 1992 with Canada, our closest neighbor to the North and largest trading partner. Sitting uncomfortably in the shadow of the 10-times larger U.S. market, Canada has imposed prohibitive tariffs against a U.S.-produced Canadian version of Sports Illustrated, ejected a U.S. country-music video cable television channel in favor of a new Canadian one, and built regulatory walls against planned investment by a U.S. direct broadcast satellite firm. In these and other cases, U.S. attempts to assert the underlying economic protectionism of these policies

¹⁸ Sen. Byrd, *op. cit.*

¹⁹ See Stephen R. Konigsberg, "Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws," 12 Cardozo Arts & Entertainment Law Journal 281, 1994, p. 307 for a brief description of attempts to liberalize audio-visual policies in the Uruguay Round of GATT talks.

have been countered by arguments that the United States itself conducts cultural nationalism through section 310 (b) restrictions.

Such "cultural" trade disputes are likely to proliferate rather than decline as the trend toward convergence of communications systems accelerates. They may grow more complicated to solve, as the ultimate source of programming becomes more obscure -- for example, video-on-demand brought into the home via Internet? But, for the United States, the policy importance of ensuring maximum market opening for communications exports will remain high. By current measures, the entertainment industry is the second-largest export earner for the U.S., second only to aviation. To the extent that section 310 restrictions retard export efforts, their policy significance will increase.

III. THE NATIONAL SECURITY CONUNDRUM

To evaluate the continued validity of foreign ownership restrictions in communications, it is necessary first to review in more detail what in fact were the national security concerns reflected in the two Radio Acts and ultimately in section 310. Indeed, the first question which arises is the definition of "national security", what the term means in the context of communications generally, and in the Communications Act in particular.

An Evolving Definition

"National security" is not defined in the Communications Act. Given the nature of such concerns, it is perhaps not surprising that governments in general are disinclined toward specific definition. Of course, industry -- the probable target of any regulation -- prefers specificity and criticizes the lack thereof. The General Accounting Office (GAO) addressed this question in the context of the 1988 Exon-Florio Amendment to the Defense Production Act²⁰, which gives the President authority to investigate and block foreign investments threatening to impair national security. In a 1990 report, the GAO notes that "national security" was not defined in Exon-Florio, and that legislators expected it to be interpreted "broadly and without limitation to particular industries". The GAO concludes nonetheless that lack of a specific definition did not affect the ability of the review committee established under the law to investigate investments.²¹ Likewise, lacking a statutory or regulatory definition of national security under the Communications Act, it is

²⁰ 50 USC Appendix 2170.

²¹ GAO, "Foreign Investment: Analyzing National Security Concerns," March 1990, pp.11-12.

necessary to turn to usage, i.e. , how it has been interpreted by the regulator, the courts and Congress.

Initially, the FCC interpreted section 310 to reflect a generalized national security objective, but that interpretation has changed over time. In 1958, in reaction to a court challenge,²² the Commission was pushed to adopt a somewhat more precise view mirroring the original intent of section 310, to wit, preventing alien activities against the U.S. Government during wartime. Relying on the legislative history of the Radio Act of 1927, the court rejected conflicting contentions that section 310 was a much blunter (and ultimately more expansive) tool, designed to block “foreign influence” or an “alien tinge” generally in U.S. broadcast activities. In 1974, Congress revised section 310, adding nothing new to the definition of national security concerns, but limiting the section’s applicability to common carrier, broadcast and aeronautical radio services, areas which at that time were seen to most directly affect national security.

The Current Congressional View

In the initial stages of Congressional debate over the new telecommunications law finally passed in 1996, both House and Senate members put forward proposals to modify section 310 (b), at least with respect to common carriers. While specific terms of the two bills differed, both houses proposed permitting waivers of the 25 percent limit on foreign investment in common carriers on a reciprocal basis, that is, where the investor’s home country allowed equivalent investment for U.S. firms in its own market. The bills generated formal comment by the Administration and other interested parties, mostly

²² Noe v. FCC, 260 F.2d 739 (D.C. Cir. 1958), cert. denied, 359 U.S. 924 (1959).

geared to the implications of such legislative for the competitive posture of U.S. firms abroad. For example, U.S. Trade Representative Mickey Kantor wrote to Senator Robert Byrd that authority to remove the 25 percent limit "through international negotiations or on the basis of similar levels of openness could lead in turn to the removal of ownership restrictions and monopoly barriers to U.S. countries in key markets abroad."²³

However, discussion of national security concerns per se was brief. In large part, this was due to the fact that foreign ownership restrictions in broadcast licensees, as opposed to common carriers, were never seriously discussed. According to staff members on both sides of the political aisle, removal of foreign ownership restrictions in broadcast would have been too sensitive politically, in view of the dominant influence exercised by the broadcast media over news and other information received by the American public. The Administration supported this viewpoint with testimony on the need for continuing to treat broadcast and common carriers differently for purposes of section 310 (b) (4) limits.²⁴ Limiting proposed Congressional action to common carriers, the few comments related to "national security" concerns ranged from political statements such as that by Rep. Gene Taylor (D-Miss) expressing opposition to foreign ownership, to closed-door Administration explanations of law enforcement concerns. The latter were described by Senator Byrd as follows:

"The FBI has indicated to me its grave concern over foreign penetration of our telecommunications market. Foreign governments whose interests are adverse to the U.S., foreign drug cartels, international criminal syndicates, terrorist

²³ letter dated April 24, 1995, reported in the Congressional Record, May 25, 1995, S7494.

²⁴ Testimony of Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce, in Hearings on H.R. 514 Before the Subcommittee on Commerce, Trade & Hazardous Materials of the House Committee on Commerce, 104th Cong., 1st Sess., March 3, 1995.

organizations, and others who would like to own, operate or penetrate our telecommunications market should be prohibited from doing so.”²⁵

In response to such concerns, both chambers, in particular the House, would have given the President latitude to block any waiver of section 310 (b) restrictions on grounds including national security and law enforcement concerns. The Senate bill also specifically provided that nothing in the new legislation would affect the President’s ability under the Exon-Florio law to block mergers or acquisitions by foreign interests for the sake of national security. However, when House and Senate conferees were unable to reconcile the two versions, both Congressional proposals were abandoned during the final stages of enactment of the 1996 Telecommunications Act.

FCC Action -- Opening Pandora’s National Security Box

Although the Congress found itself unable to act in this area, the FCC itself recently completed debate on how broadly to apply section 310 to common carriers, and under what conditions. In its November 1995 Report and Order in the matter of Market Entry and Regulation of Foreign-Affiliated Entities (Docket No. 95-22), it established an “equivalent competitive opportunities” test under which the 25 percent limit on common carrier investment could be waived -- similar to the abortive Congressional approach. In so doing, however, the FCC also compiled a much more extensive public record of industry views on the national security issue, and itself addressed the question of what national security concerns still apply in this area.

²⁵ Congressional Record, June 13, 1995, S8253.

Taking much the same logical path as Congress -- hoping to use new flexibility in section 310 (b) as market-opening leverage for U.S. firms abroad -- the FCC went even further by expliciting linking economic to national security concerns. In fact, it would appear that the Commission, unlike Congress, looked directly through an economic prism in evaluating the national security implications of a proposed investment. For example, the FCC Notice of Proposed Rulemaking (NOPR) in the above-mentioned matter notes:

"The original national security rationale for limiting foreign ownership in a parent corporation has less applicability today than it had in the 1930's. Today there is a plethora of service providers. No single licensee which is owned in part by a foreign corporation could take over the wireless or wireline services in the United States in a time of war."²⁶

Further, the NOPR comments that:

In addition, our current approach to considering foreign entry into U.S. radio-based telecommunications and broadcast markets through application of Section 310(b)(4) may not be the most effective means of promoting global competition in these areas. It may be that our decisions in public interest determinations under Section 310(b)(4) should more directly consider how the decision will influence the development of a competitive market for international communications services.²⁷

These questions about the continued relevancy of the original national security rationale of foreign ownership restrictions, and the growing importance of economic concerns, were not new ones. They were the culmination of an academic and policy debate dating back to the Arab oil embargo and OPEC price hikes in the early 1970's, which caused many Americans to question the wisdom of permitting large inflows of foreign capital to purchase U.S. real estate and enterprises. The Committee on Foreign

²⁶ FCC, Notice of Proposed Rulemaking in the Matter of Market Entry and Regulation of Foreign-affiliated Entities, FCC 95-93, IB Docket No. 95-22, Adopted February 7, 1995, footnote 16.

²⁷ Ibid., para 24.

Investment in the United States (CFIUS) was created in 1975 to provide an interagency review of foreign investment. CFIUS' role was advisory, limited to examining the national security implications of such investments and making policy recommendations. Although CFIUS reviewed fewer than 30 investments between 1975 and 1988 and recommended action against none,²⁸ concerns about foreign investment grew once again in the mid-1980's, reflecting several factors -- the emergence of Japan as an economic power, a growing trade deficit, decline of the U.S. dollar, and new technological and competitive challenges facing U.S. industry. In 1988, passage of the Exon-Florio Amendment gave teeth to the CFIUS process by permitting the President to block a foreign investment which might be harmful to national security.

The debate over the definition of national security was crystallized by the authors of a 1990 study on U.S. National Economic Security in a Global Market, who recommended that the national security community "redefine national security to include economic security"²⁹ and that government and industry "recognize that national competitiveness is a national security issue."³⁰ Although the authors looked at foreign investment generally, and did not specifically examine the communications industry, their conclusions support the apparent movement by both the FCC and Congress in this direction. However, since both bodies stopped short of a formal redefinition of national security, the debate remains open. What we are left with is the initial question -- whether

²⁸ Linda Spencer, Foreign Investment in the United States: Unencumbered Access, Economic Strategy Institute, Washington, D.C., May 1991, p. 6.

²⁹ Author's note -- "economic security" is itself an undefined term!

³⁰ LTC Raymond A. Gauger, LTC Randy C. Hinds, Lt Col David K. Holmes, and LTC Marc A. Jamison, U.S. National Economic Security in a Global Market, John F. Kennedy School of Government, Harvard University, National Security Program Discussion Paper 90-03, May 1990, pp. 137-138.

the original national security goals of the Communications Act of 1934 are still served by the foreign ownership restrictions in section 310 -- plus an additional one. The new, albeit inextricably related, question is, "even if economic interests should arguably be a component of national security, are those economic interests advanced by maintaining foreign ownership restrictions?"³¹

Some analysts argue strongly that, in fact, section 310's restrictions (and similar ownership restrictions in other industrial sectors) are protectionist measures, ineffective at best in protecting the initial national security concerns of the legislation, and downright harmful with respect to improving the competitiveness of the broadcast industry. In addition, as explored above, the existence of section 310 has proved an impediment in efforts to open foreign telecommunications and audio-visual markets to U.S. firms. As described in the following section, these arguments were also made in force by industry respondents to the FCC's NOPR.

...And Trying To Close It Again

The communications industry took the FCC at its word and responded in volume to the Commission's invitation to comment on the questions and issues presented. At one end of the spectrum, the Minority Media and Telecommunications Council (MMTC) asserted that "alien ownership in American media would make broadcast owners even more distant from viewers than many of them are now", so that listeners would not know

³¹ Sorin A. Bodea. "The Impact of Section 310 of the Communications Act of 1934: Economic and National Security Issues". Program on Information Resources Policy, Harvard Center for Information Policy Research, August 1992, p. 5.

who was providing programming.³² Heftel Broadcasting Corporation rebutted these comments directly, arguing that “America no longer lives in a sheltered, dominating economy, untouched by economic factors beyond her borders,”³³ and that:

“adhering to the Section 310 (b) (4) benchmark as the limit on the indirect equitable interest aliens may have in a company that controls a licensee does more to hurt the broadcast industry than it does help without any countervailing public interest benefit.”³⁴

Heftel also drew the distinction between foreign control and participation, asserting that

“the issue is not the source of programming, but who decides what programming will be placed on a broadcast station. British programming is a mainstay on public broadcasting, for example, but it is U.S. citizen-controlled licensees who decide whether such programming should be broadcast at all.”³⁵ (p.9)

Furthermore, the company compared the freedom of cable television operators (despite the fact that many originate their own programming) to attract foreign investment, with the restrictions faced by broadcasters. Heftel therefore urged that the FCC permit indirect foreign investment in broadcast enterprises on “essentially the same basis” as common carriers.³⁶

The Motion Picture Association of America, Inc. (MPAA) presented even stronger views than Heftel in support of liberalized foreign investment in broadcast. MPAA noted that:

“Historically, the U.S. Government had been concerned that foreign control of mass media facilities would confer control over the content of widely available broadcast material, which could lead to the possibility of foreign propaganda and misinformation. These fears were not unreasonable during a period when there were relatively few sources of information available to the public. MPAA does not

³² Comments on FCC docket 95-22 by Minority Media and Telecommunications Council, p.2.

³³ Reply Comments of Heftel Broadcasting Corporation on FCC Docket 95-22, April 28, 1995, p.10.

³⁴ *Ibid.*, p. 11.

³⁵ *Ibid.*, p. 9.

³⁶ *Ibid.*, p. i.

believe that foreign ownership provides the same sort of risk in today's environment, where sources of information have multiplied tremendously."³⁷

With respect to the FCC's specific proposal, MPAA supported establishment of a reciprocity test, as least until multilateral commitments on liberalization of basic telecommunications and communications services (including audiovisual and multi-media) could be achieved.³⁸

Arch Communications Group took a view similar to MPAA's. While supporting a reciprocity test to encourage opening of foreign markets, Arch noted that "there is less justification" for the national security precautions of section 310 "since there are a variety of service providers" today than when the statute was enacted. "As a result, no single licensee, (partially owned by a foreign corporation or not) could take over all the wireless or wireline services in the U.S. during a time of war."³⁹

In its final Report and Order (adopted November 28, 1995), the FCC summarized industry and Administration comments and concluded that foreign ownership of broadcast licenses continued to present different questions than for other types of radio spectrum licenses. It noted that, "Because common carriers generally exercise no control over the content of their transmissions, ...commenters (supporting a reciprocity test) find little basis for concern over national security"⁴⁰ (emphasis added). However, the Commission concluded that the same, albeit diminished, national security concerns that led to the original enactment of section 310 still remained with respect to broadcast. In its view, the

³⁷ Comments of the Motion Picture Association of America, Inc., on FCC Docket 95-22, April 11, 1995, p.5.

³⁸ Ibid., p. 3.

³⁹ Comments of Arch Communications Group on FCC Docket 95-22, p. 8.

⁴⁰ FCC Report and Order, op. cit., p. 72, para 184.

central concern is that “foreign control of a broadcast license confers control over the content of widely available transmissions”⁴¹ (emphasis added).

Reconciling Intent and Current Reality

Since the determining factor for the FCC was whether foreign control of a licensee conferred control over the content of the transmission, then an analysis of how effective section 310 is in protecting national security goals should focus on that question. For example, looking at the totality of section 310, Greg Sidak notes that ownership restrictions apply only to common carriage, not private carriage, and asks:

“If a foreigner is intent on harming the U.S., how does it possibly advance U.S. national security to forbid him from providing wireless common carriage while allowing him to provide wireless carriage of messages by satellite to and from U.S. territory? A well-financed enemy of the U.S. would be perfectly happy to be licensed to transmit sensitive information by satellite on a private carriage basis and forgo the opportunity to hold out his transmission capacity for hire on a common carrier basis.”⁴²

Noting another inconsistency in the law, Sidak comments that:

“it is remarkable that the national security rationale for section 310 (b) continues to be cited when Congress in effect compromised, if not repudiated, that objective when it amended the Communications Act in 1971 and 1974 to permit the FCC to license foreign amateur radio operators” (on a reciprocal bilateral or multilateral basis).⁴³

Presumably, national security could be compromised whether the foreign operator presented him/herself as an amateur or professional in the radio field.

⁴¹ *Ibid.*, p. 74, para 192.

⁴² Sidak, *op. cit.*, pp. 113-4.

⁴³ *Ibid.*, p. 98.

However, proponents of section 310 would argue that technological vulnerabilities in one area, whether or not they could be exploited in another, nonetheless remain in need of protection. The 1994 report of the National Communications System on The Electronic Intrusion Threat to National Security and Emergency Preparedness Telecommunications notes that:

“The telecommunications infrastructure in this country is evolving toward an environment featuring a high degree of interconnectivity between network elements, interconnection of carrier signaling networks, customer control of virtual network configurations, and other types of advanced intelligent network functions. The demand for broadband applications, such as video services, over public networks is also creating the need to implement technologies that can deliver these services. Based on previous examples of electronic intruder flexibility and ingenuity, it must be assumed that electronic intruders are poised to take advantage of these new technologies and services as they are implemented in the PSN (public switched network).⁴⁴

Foreign ownership of key parts of this increasingly interconnected network gives pause to many members of the national security community, which does not have the luxury of dedicated communications. Rather, the communications systems used for federal government generally, including for military command and control and for managing emergencies, all depend in whole or in significant part on private industry.⁴⁵ Cooperation from the private industry is therefore needed to ensure that national security goals can be met. Concerns along these lines are deeply held: “When the effectiveness of command-and-control communications is in jeopardy, so is the ability to handle emergencies, the capability to prosecute war, and the credibility of deterrence.”⁴⁶ Furthermore, there may be some situations today, harkening back to the original Radio Act concerns, where

⁴⁴ “An Awareness Document”, Second Edition, December 5, 1994, p. 3-12.

⁴⁵ George H. Bolling, AT&T, Aftermath of Antitrust, National Defense University, Washington, D.C., 1983, p. 8.

⁴⁶ Ibid., p.2.

communications from a particular defense installation might be compromised by radio signals from a foreign-owned or controlled transmitter.

A key argument against this line of thought is the assumption that investors of a foreign power which had unfriendly attitudes toward the United States would be unlikely to seek FCC licenses to begin with. Presumably, a declared or soon-to-be enemy would not want to engage in a long regulatory proceeding to obtain a base of operations. In any case, the effort would be futile since an obvious enemy clearly would not receive FCC approval. For that matter, even if section 310 did not exist, such an investment would likely be rejected under the Exon-Florio investment review process. As an ultimate fallback, the U.S. Government has emergency and wartime powers under section 606 (c) of the Communications Act enabling it to seize radio stations and wireline facilities.

It is unfortunate, albeit understandable, that testimony on this issue by the FBI and other interested agencies has been for the most part classified. One can speculate, however, on the kinds of national security and law enforcement concerns these parties may have raised behind closed doors. One concern might be the possibility of espionage. For example, the foreign owners of a common carrier could install equipment ostensibly to record traffic for business purposes (such as "quality control"), and permit monitoring by intelligence operations of their own country or other interests unfriendly to the United States. In an "information warfare" scenario, foreign control of a carrier operating in the United States could open the door to contamination of key domestic switches, giving the foreign power the ability to cause a short (but carefully targetted) or prolonged "crash" of a critical portion of the public switched network -- with devastating consequences.

While these two speculative scenarios might give real cause for concern, however, proponents of lowering U.S. legal barriers to foreign investment would point out that maintaining section 310 does not ensure against such espionage or information warfare. Rather, section 310 licensing restrictions merely complicate the job of foreign agents, forcing them to seek out and compel -- or pay -- an accomplice employed by a duly licensed carrier to carry out any proposed scheme. Further, the redundancy built into the U.S. network, in addition to its sheer size, do provide at least some protection against direct security threats.

More prevalent (and probably more realistic) than concerns about espionage and sabotage, are concerns about psychological warfare and subtle erosion of the national will to fight against a perceived enemy. Even textbooks note that "broadcasting has political and social power because of its unique ability to communicate instantly with an entire nation....., bypassing officialdom by going directly to the people."⁴⁷ It is this particular content concern that led both the FCC and Congress to consider waiving foreign ownership restrictions with respect to common carriers, but not for broadcast entities. And it is this concern which, by virtue of its inherently political nature, is the most difficult to evaluate, especially given the rapid march of technological advance in the communications industry. However, a comment by one analyst gives food for thought: "There is no doubt that foreign propaganda broadcasting can be, and is, effective under

⁴⁷ Sydney W. Head and Christopher H. Sterling, Broadcasting in America, a Survey of Electronic Media, Houghton Mifflin Company, Boston, 1990, p. 488.

some conditions. One condition for effectiveness is that the recipient population does not trust its own domestic broadcasts.”⁴⁸

Perhaps the overriding question at this point in time is one which will be addressed in the next section:

“As information technology and systems become ubiquitous, is it reasonable to maintain restrictions on foreign ownership of common carriers based on national security concerns, when sensitive information could just as easily be transferred using facilities not based on common carriage?”⁴⁹

In this context, of course, “sensitive information” should be taken to include political as well as military messages. And with the advent of convergence, does it make sense to differentiate between common carrier and broadcast licensees for this regulatory purpose?

⁴⁸ Ithiel de Sola Pool, “Direct Broadcast Satellites and the Integrity of National Cultures”, in National Sovereignty and International Communication, ed. by Nordenstreng and Schiller, Ablex Publishing Corporation, Norwood, New Jersey, 1979, p. 141.

⁴⁹ Bodea, op. cit., executive summary.

IV. NEW TECHNOLOGICAL CHALLENGES

Whether, as some claim, we are entering a new era -- a so-called "information age", or merely experiencing an incredibly rapid surge in information and communications technology, the questions are the same. Where is the technology taking us, and how will it affect systems, individuals and societies? How will information be conveyed, and who will control the content? Will it even be possible in all cases to trace the origin of a message or program? Since we are still in the midst of this "revolution", the answers are not readily evident. But there are at least three trends which are relatively clear, and relevant to the question of the continued validity of foreign ownership restrictions in communications -- direct broadcast satellite technology, increasingly global computer links, and the convergence of information and communications technologies generally. As one analyst argued:

"The new information technologies will not single-handedly destroy the state, but they will remove from it the exclusive control over information. The days of the sovereign government, restricting the access of its citizens to ideas about the world they live in, are clearly almost over."⁵⁰

Direct broadcast satellites have had a dramatic impact on how the world receives both its news and its entertainment. So long as potential viewers are within a given satellite's "footprint", and have the gadgetry (now down to a pizza-pan sized dish which fits on a windowsill), the programming carried by the satellite is within reach. Canadian regulators recently learned this lesson, much to their annoyance -- despite regulatory barriers to the delivery of television signals within Canada by foreign-owned direct broadcast satellite companies, thousands of Canadian citizens living near the U.S. border

⁵⁰ Graham Walker, "Sovereign Satellites?", 51 The World Today 10, October 1995, p. 184.

defied their government's policy by purchasing satellite dishes in the U.S. and installing them in their homes. The burgeoning "gray market" helped force a review of government policy.

The well-documented "CNN effect" is illustrative of the power of satellites in conveying news to citizens of the world. More timely than reports via traditional news distribution mechanisms, CNN's news broadcasts have had dramatic impact on government decision-making from Baghdad to Washington to Tokyo -- in time of war, economic crisis or global celebration. Such global channels, whether owned by U.S. citizens or Libyans, share one characteristic -- they "have no respect for political boundaries."⁵¹

The Internet is the most visible symbol of another technological breakthrough -- desktop access to worldwide data bases, and desktop ability to communicate via computer to individuals, businesses and governments around the world. According to one estimate, at least 30 million people, dispersed over 60 percent of the globe, are now using the Internet.⁵² Controlling information flows over the Internet is now a major policy focus of many governments, although experience to date in limiting flows has been challenging. For example, the on-line service CompuServe Inc. was faced with a technological challenge after German officials undertook an investigation of distributors of on-line pornography. Since CompuServe was unable to block access to a specific geographic location, it temporarily suspended access to the challenged newsgroups for 4.3 million of its users. Service was not restored for almost two months, until the company had

⁵¹ Frank J. Stech, "Preparing for More CNN Wars", in Essays on Strategy XII, J.N. Petrie, ed., NDU Press, Washington, D.C., 1994, p. 237.

⁵² Walker, op. cit.

implemented a "v-chip"-like blocking device for consumer use. U.S. companies expect similar challenges in their other foreign ventures. Peter Krasilovsky, an analyst with Arlen Communications Inc., was quoted as saying that:

"In France, the whole Internet is considered an American cultural imperialism plot. So to succeed in a market that is critical to them, what U.S. companies have to do is show a real sensitivity to the needs of European users and establish partnerships with local providers to make the path in as smooth as possible."⁵³

The effects of satellite and computer technologies are relatively easy to see, however, compared with the effects of the coming convergence of information and communications technologies. What will happen when individuals can command at-home delivery of news programs through the Internet, or send political messages to a global audience, or receive video on demand? The prognosticators have begun circling, but no one can claim to be blessed with 20-20 foresight in this area. One interesting perspective is that, instead of the opportunities brought by convergence turning people into "citizens of the world", the opposite may happen:

"....the proliferation of microbroadcasters may promote a precisely opposite effect of localizing, rather than globalizing, the way world events are viewed -- a de-CNNization of perception. Communities of interest, too small to be reached profitably by mass media, could be reached by targeted means. As each community's version of the news becomes subject to its own filters and slants, manipulating mass audiences will become increasingly difficult."⁵⁴

In such an environment, how constraining would section 310 restrictions be? In all likelihood, not very (if at all) with respect to the initial national security goals of those restrictions, or even in promoting "economic national security" goals. To the contrary, it

⁵³ reported by Kara Swisher, in "Old World, New Frontier in Cyberspace", The Washington Post, December 12, 1995, p. C4.

⁵⁴ Martin C. Libicki, What is Information Warfare?, The Center for Advanced Concepts and Technology, National Defense University, August 1995, p. 37.

seems that the future which technology is bringing us will be a fast-paced one, with furious competition between firms⁵⁵ and an increasing need for international strategic alliances. In this atmosphere, the existence of regulatory constraints such as section 310 restrictions may serve only to slow the ability of firms to compete in the new environment, and to bring new services to American consumers.

⁵⁵ Although some assert that the "string of mega-mergers" in the industry will result in oligopoly: see Jonathan Tasini, "The Tele-Barons", in The Washington Post, February 4, 1996, p. C1.

V. CONCLUSIONS

The over-200 year "American experience" has been based on a seemingly inherently contradictory combination of steadfast allegiance to bed-rock principles and a taste and talent for dynamic change. Thus, even our most basic laws are continually subject to reassessment. Legislators or politicians have proposed "fundamental" changes to our tax structure so often, just within the last 15 years, that it is difficult to recall the precise number. The "v-chip" provisions of the 1996 Telecommunications Act have surprised (and angered) many strict Constitutional constructionists by threatening government intervention into the content of television programming via a violence-rating code. It is in fact hard to think of any law which passage of time and changed conditions does not make vulnerable to review. Foreign ownership restrictions in communications are no exception; indeed, many would argue that they constitute a prototype of an outdated law. Political sensitivities about broadcast aside, the press of new technologies make this an appropriate -- necessary -- time to revisit the need for these provisions.

Despite the cursory nature of the examination in this paper, it should be clear that section 310 restrictions have, in almost every since, outlived their initial purpose. The nature of war, as well as the nature of communications, has changed dramatically since the 1904 Russo-Japanese War, and even since the enactment of the 1934 Communications Act. In a world where former enemies are friends, where Rupert Murdoch attempts a direct broadcast satellite venture with a Chinese company, where Russian troops work under the NATO flag in Bosnia, where U.S. military forces emphasize their future role in "operations other than war", change becomes the norm and not the exception.

Recent movement by the FCC and dialogue in the Congress are both encouraging. However, the question remains whether the reciprocity approach undertaken to liberalize foreign investment in common carriers will permit fast enough openings to keep pace with technology developments. Clearly, the FCC is taking a gamble, predicated on its and the Administration's best analysis of the multilateral political dynamic, and whether a reciprocity policy will encourage sufficient and quick market openings in other countries. But the nature of the gamble has not been explicitly explored -- while industry comments were plentiful, they did not bring into focus the potential policy impacts of new advances in technology.⁵⁶

At the same time, legislators need to open a dialogue on the broadcast issue. For too long, it has been a "sacred cow" which all participants -- industry as well as politicians -- have feared to touch. In attempting to redefine national security concerns as "economic national security", or in introducing economic concerns to the evaluation of national security, policymakers have correctly analyzed the fundamental importance of economic strength to the continued viability of the United States. However, for U.S. firms, products and services to be truly competitive on a global basis, we will need to alleviate the concerns of other countries about U.S. "cultural imperialism" being conducted through new information and communications technologies.⁵⁷ A first step in that long-range and difficult effort should be to revisit, and perhaps drop, our own outdated and ineffective barriers.

⁵⁶ These potential impacts may be brought into focus through France Telecom and Deutsche Telekom AG's purchase of 20% of Sprint Corp. That transaction was approved by the FCC in December 1995 under the new reciprocity rule.

⁵⁷ See an interesting article on this point by Gabriel Escobar and Anne Swardson, "From Language to Literature, a New Guiding Lite", in The Washington Post, Tuesday, September 5, 1995, p. A1.

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